

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

ENRIQUE BUSTAMANTE, *Applicant*

vs.

**SCRIPPS HEALTH, self-insured,
administered by SEDGWICK RIVERSIDE,
*Defendants***

**Adjudication Number: ADJ14292521
San Diego District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 20, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**ENRIQUE BUSTAMANTE
ZUCKERMAN & WAX
ENGLAND, PONTICELLO & ST. CLAIR
EDD SDI SAN DIEGO**

LN/pm

*I certify that I affixed the official seal of
the Workers' Compensation Appeals
Board to this original decision on this
date. o.o*

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. NATURE OF PETITION

On March 19, 2024, petitioner Scripps Health, self-insured, administered by Sedgwick Riverside filed a timely, verified Defendant's Petition for Reconsideration (hereinafter the "Petition for Reconsideration") contending that: (1) by the award the workers' compensation judge acted without or in excess of his powers; (2) the evidence does not justify the findings of fact; and (3) the findings of fact do not support the award.

Applicant Enrique Bustamante filed a timely, verified answer to the defendant's Petition for Reconsideration, on April 2, 2024.

The Petition for Reconsideration raises two main arguments. First, defendant argues Panel Qualified Medical Evaluator, Steven Wachs, D.C., should be removed from the case. Second, the reporting of Dr. Wachs is not substantial medical evidence.

II. PROCEDURAL HISTORY

The trial in this matter was conducted on July 11, 2022, and July 18, 2022. (Minutes of Hearing/Summary of Evidence ("MOH/SOE") 7/11/22 and 7/18/22.) The matter was submitted for decision by the Workers' Compensation Judge ("WCJ") on July 29, 2022. (MOH/SOE, 7/18/22, 1:22.) On August 8, 2022, the submission was vacated by the WCJ because the medical evidence submitted by the parties at trial was not substantial medical evidence on the issue of injury arising out of and in the course of employment. (Findings and Order; Opinion on Decision, 8-8-23.) The parties were directed to develop the record. (Findings and Order; Opinion on Decision, 8/8/23, p. 2.)

The parties obtained supplemental reporting from Dr. Wachs in the form of medical reports dated November 2, 2022, and August 17, 2023. (MOH/SOE, 1/4/24, 2:6-7.) The matter was resubmitted for decision on January 4, 2024. (MOH/SOE, 1/4/24, p. 1.) On February 23, 2024, Findings and Award and First Amended Opinion on Decision were issued by the WCJ.

III. PETITIONER ASSERTS FOR THE FIRST TIME IN ITS PETITION FOR RECONSIDERATION THAT DR. WACHS SHOULD BE REMOVED FROM THE CASE

The issues presented at trial were: (1) injury AOE/COE, (2) temporary disability, (3) need for further medical treatment, (4) the lien of EDD, and (5) attorney fees. (MOH/SOE, 7/11/22, 2:10-16.) The replacement of Dr. Wachs as the Panel Qualified Medical Evaluator was not an issue at trial. (MOH/SOE, 7/11/22, 2:10-16.) Moreover, petitioner has not filed a petition to remove Dr. Wachs as the Panel Qualified Medical Evaluator in this matter. Therefore, the issue is not before the court. A party may not raise a new issue on reconsideration. (*Espino v. Fullerton Foods* (2022) 87 Cal. Comp. Cases 796, 806; see also, Labor Code section 5502(d)(3).) In *Cottrell v. WCAB* (1998) 63 Cal. Comp. Cases 760, 761, (writ denied), the court stated that: "[i]t is improper to seek reconsideration on an issue not presented at the trial level (See *California Compensation Insurance Co. v. Workers' Comp. Appeals Board* (Gale) (1997) 62 Cal. Comp. Cases 961 (writ denied).)" Petitioner's request to remove Dr. Wachs from this case, for the first time on reconsideration, is improper and should be denied.

Assuming, *arguendo*, that petitioner's attempt to remove Dr. Wachs as the Panel Qualified Medical Evaluator in this matter is a proper issue to raise on reconsideration, in support of its attempt to remove Dr. Wachs from the case, petitioner appears to misrepresent Dr. Wachs' deposition testimony. Petitioner asserts "Dr. Wachs could not identify a single case in which he found a medical condition wholly nonindustrial." (Petition for Reconsideration, 8:12.) Dr. Wachs made it clear during his deposition that he was prevented from identifying a specific case because it would be improper to reveal patient information regarding patients unrelated to the present case. Dr. Wachs testified:

Okay. Well, it sounds like the same question, so the best way for me to answer it is, without focusing on a specific case so I'm not, obviously, revealing any patients, there have been patients where I have seen multiple body parts, and I have determined that these body parts are industrial and these body parts are nonindustrial.

(Joint Exhibit 1, 17:15-21.) Dr. Wachs has an obligation not to identify the names of prior patients he has evaluated. It is improper for defendant to use this obligation as a sword to assert that Dr. Wachs is somehow biased against defendants because he cannot identify the names of prior patients.

Without providing the names of specific patients, Dr. Wachs did testimony that he has found injuries to be nonindustrial in the past year.

Q: So my question was more so legally, in the last, say, year plus, have you had any cases where you found no industrial causation to any part of the body?

A: And, again, I'm not referring to a specific case. It is possible, but I'm not thinking of one case in particular. But what I would say is that I'm asked to give my expert opinion on that quite regularly. So I would say I've given opinions, yes, on both, but I'm not referring to a specific case. (Joint Exhibit 1, 14:2-10.)

The grounds for removing a medical provider from a Qualified Medical Evaluator Panel are set forth in Title 8, California Code of Regulations Section 31.5(a). Petitioner has failed to present evidence to establish that Dr. Wachs should be removed under Section 31.5(a).

The removal of Dr. Wachs in the matter is improper because the issue is being raised for the first time on reconsideration and petitioner has not proven that there is a factual basis to remove Dr. Wachs as the Panel Qualified Medical Evaluator in this matter.

IV. DR. WACHS' OPINION REGARDING INJURY AOE/COE IS SUBSTANTIAL MEDICAL EVIDENCE

Petitioner asserts the medical opinion of Dr. Wachs is not substantial medical evidence on the issue of injury AOE/COE. To support its position, petitioner points to various statements in Dr. Wachs' reporting and deposition. It is important to note that medical evidence must be evaluated as a whole. (*Gay v. WCAB* (1979) 96 Cal.App.3d 555, 564.)

In evaluating a medical report, isolated statements may be misleading. Intellectual candor of a physician may lead to single statements which, when isolated, may be misunderstood. In evaluating the evidentiary value of medical evidence, a physician's report and testimony must be considered as a whole rather than in segregated parts. (*Gay v. WCAB* (1979) 96 Cal.App.3d 555, 564, citations omitted.)

Petitioner cites to isolated statements to assert Dr. Wachs' medical opinion is not substantial medical evidence. Many of the statements referred to by petitioner are irrelevant to the finding of injury AOE/COE to the lumbar spine. For example, petitioner refers to applicant's concurrent, part-time employment

with Sharp Rees-Stealy performing work as a sterilization technician, similar to his work with Scripps Health. It is true that Mr. Bustamante worked part-time for Sharp Rees-Stealy as a sterilization technician. In fact, the applicant testified to the employment at trial. Applicant testified he worked as a sterilizing technician for Sharp Rees-Stealy from 2016 or 2017 through February or March 2020. (MOH/SOE, 7/18/22, 10:20-21; 11:6-7.) Applicant worked the graveyard shift on Friday and Saturday nights at Sharp. (MOH/SOE, 7/18/22, 10:21-22.) Applicant left his employment at Sharp because Sharp wanted him to work more than two days per week. (MOH/SOE, 7/18/22, 11:6-7.) The fact that the applicant worked part-time in a similar position for another employer does not mean that the applicant did not sustain a cumulative trauma injury during his employment with defendant Scripps Health. The concurrent employment may be relevant to the issue of contribution. However, concurrent employment does not negate the injury sustained on a cumulative trauma basis as the result of applicant's employment with defendant Scripps Health.

Petitioner also refers to Dr. Wachs' opinion in his August 17, 2023, report that the applicant should be referred for psychological or psychiatric treatment due to stress and anxiety from his unresolved injury, loss of recreational activity, inability to return to gainful employment, impact on his personal relationships, etc. Whether petitioner agrees or disagrees with Dr. Wachs' opinion in this regard, his opinion is irrelevant to the issues presented at trial. The issues presented at trial from a medical perspective were injury AOE/COE; to the low back and the need for further medical treatment. (MOH/SOE, 7/11/22, 2:2-15.) The findings of fact in this matter are that Mr. Bustamante sustained an injury arising out of and in the course of employment to his low back and that he is in need of further medical treatment to cure or relieve the effects of the injury to his low back. (Findings and Award, 2/23/24, pp. 2-3.) Dr. Wachs' opinion regarding referral to a psychologist or psychiatrist is irrelevant to the issues submitted at trial and the Findings and Award issued on February 23, 2024.

Petitioner also asserts that Dr. Wachs' reference to the applicant lifting from 50 to 75 pounds is factually inaccurate. (Petition for Reconsideration, 13:1-3.) Petitioner states: "[a]t trial there was no evidence to support those lifting requirements" (Petition for Reconsideration, 13:3-4.) Contrary to petitioner's assertion, Mr. Bustamante specifically testified to this fact at trial. Mr. Bustamante testified that the trays containing the instruments should have weighed 25 pounds or less because that is what they weigh when they are sent into the operating room. (MOH/SOE, 7/18/22, 8:15-16.) However, the technicians in the operating room tend to place all of the used instruments into one or two trays, so they are much heavier when they return from the operating

room. (MOH/SOE, 7/18/22, 8:16-17.) The surgical instruments are made of steel, so they can be heavy. (MOH/SOE, 7/18/22, 8:18.) Applicant estimated the stacked trays full of instruments after surgery can weigh up to 50 to 75 pounds. (MOH/SOE, 7/18/22, 12:3-4.) Moreover, the First Amended Opinion on Decision specifically states: "[t]he WCJ finds Mr. Bustamante's testimony regarding his job duties to be credible. (*Garza v. WCAB* (1970) 3 Cal.3d 312, 319.)" (First Amended Opinion on Decision, p. 8.) Dr. Wachs' reliance on applicant's trial testimony that the WCJ found credible, does not support petitioner's assertion that Dr. Wachs' medical opinion is not substantial medical evidence.

Petitioner is correct in noting the applicant was not as forthcoming as he should have been regarding his prior workers' compensation claim and this impacted Dr. Wachs' first several reports. (Petition for Reconsideration, 10:14-18.) The Opinion on Decision issued on August 8, 2022, states that Dr. Wachs had not been provided with an adequate medical history regarding the applicant's prior work-related injury. (Opinion on Decision, 8/8/22, p. 10.) Therefore, the submission was vacated, and the parties were ordered to develop the medical record. (Findings and Order, 8/8/22, p.2)

The extensive medical records from the July 23, 2003, injury were provided to Dr. Wachs by the parties, after which he issued his August 17, 2023 report addressing the issue of injury arising out of and in the course of employment. (Court Exhibit X.) In his report dated 'August 17, 2023, Dr. Wachs provides a detailed review and summary of the medical records from applicant's July 3, 2003, injury at pages 22 through 43 of his report. (Court Exhibit X, pp. 22-43.) Dr. Wachs' August 17, 2023, report also contains a thorough discussion of the trial testimony of the applicant and his supervisor Liliana Mendoza and the applicant's deposition testimony. (Court Exhibit X, pp. 9-12.)

Dr. Wachs' opinion regarding injury AOE/COE to the lumbar spine is consistent with trial testimony -of the applicant and his supervisor, Ms. Mendoza. Applicant began working with Scripps Health in December 2014. (MOH/SOE, 7/18/22, 7:5-6.) Applicant was hired as a Sterile Processing Technician and has worked in this position during the length of his employment with Scripps. (MOH/SOE, 7/18/22, 7:6-8.) While working for Scripps, his regular shift was from 6:30 a.m.to 3:00 p.m. (MOH/SOE, 7/18/22, 7:9-10.) This shift was the busiest shift because most surgeries are scheduled during the morning. (MOH/SOE, 7/18/22, 7:11.) During his first few hours of the shift, the applicant would test the machines to make sure they were working properly and then input the test results into the computer. (MOH/SOE, 7/18/22, 7:12-15.)

The surgical instruments would usually start arriving around 9:00 a.m. as the morning surgeries were concluding. (MOH/SOE, 7/18/22, 7:17-18.) After the instruments arrived, his job" was to decontaminate the surgical instruments. (MOH/SOE, 7/18/22, 7:18.) This process involved taking the instruments apart and washing them by hand in the sink. (MOH/SOE, 1/18/22, 7:22-23.) The trays containing the instruments should have weighed 25 pounds or less because that is what they weigh when they are sent into the operating room. (MOH/SOE, 7/18/22, 8:15-16.) However, the technicians in the operating room tend to place all of the used instruments into one or two trays, so they are much heavier when they return from the operating room. (MOH/SOE, 7/18/22, 8:16-17.) The surgical instruments are made of steel, so they can be heavy. (MOH/SOE, 7/18/22, 8:18.) Applicant estimated the stacked trays full of instruments after surgery can weigh up to 50 to 75 pounds. (MOH/SOE, 7/18/22, 12:3-4.) After the instruments are taken apart, they are stored in one of six trays to be placed into a machine that washes the instruments. (MOH/SOE, 7/18/22, 7:25.) After the instruments are placed in the washing machine, the applicant will wipe down the carts that transport the instruments to the operating room. (MOH/SOE, 7/18/22, 8:2-3.) The carts must be cleaned inside and out, requiring the applicant to get on his knees to clean the inside of the cart. (MOH/SOE, 7/18/22, 8:4-5.) The carts need to be thoroughly cleaned because they are sent back to the operating room. (MOH/SOE, 7/18/22, 8:4-5.)

The applicant's job duties also involved cleaning the IV stands. (MOH/SOE, 7/18/22, 8:19.) Each IV stand contains a "brain" and a "module." (MOH/SOE, 7/18/22, 8:23.) The modules weigh approximately 15 pounds each. (MOH/SOE, 7/18/22, 8:23.) Sometimes the operating room technicians load multiple brains and modules onto one IV stand, making it much heavier and more difficult to move. (MOH/SOE, 7/18/22, 8:23-25.) The IV stands need to be cleaned from the top of the stand to the bottom of the stand. (MOH/SOE, 7/18/22, 8:25-9:1.) The brains and modules also need to be wiped down. (MOH/SOE, 7/18/22, 9:1-2.) Applicant would have to get onto his knees to clean the bottom of the IV stands. (MOH/SOE, 7/18/22, 9:3-5.) Applicant estimates he cleaned approximately 10 to 20 IV stands per shift. (MOH/SOE, 7/18/22, 9:6-7.)

The applicant testified that he spends most of the day bending and stooping while unloading the carts, washing the surgical equipment, cleaning out the carts after they are unloaded, and cleaning the IV stands. (MOH/SOE, 7/18/22, 8:12-14.) Applicant's supervisor, Liliana Mendoza, testified that Sterile Processing Technicians are required to bend over to pull the trays out of the

sterilization carts. (MOH/SOE, 7/18/22, 3:9-10.) She also testified that during some days the work can be physically demanding. (MOH/SOE, 7/18/22, 3:11.) Ms. Mendoza disputed that the sterilization technicians have to lift from 50 to 74 pounds. (MOH/SOE, 7/18/22, 5:1-2.) The WCJ finds Mr. Bustamonte's testimony regarding his job duties to be credible. (*Garza v. WCAB* (1970) 3 Cal.3d 312, 319.)

A decision by a WCJ must be supported by substantial medical evidence. (Labor Code section 5952.) The Workers' Compensation Appeals Board has a constitutional mandate to "accomplish substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403, citing Article XIV, section 4 of the California Constitution.) Following his review of the complete file in this matter, Dr. Wachs concludes that the applicant sustained an aggravation of his underlying spinal impairment as the result of a cumulative trauma injury caused by his employment as a Sterile Processing Technician for Scripps Health. (Court Exhibit X, p. 8-9.) The acceleration or aggravation of, a pre-existing, nonindustrial condition is sufficient to establish an industrial injury. (*Guerra v. WCAB* (016) 81 Cal. Comp. Cases 324, 328.) Citing *California etc. Exchange v. Ind. Acc. Com.* (1946) 76 Cal.App.2d 836, 840, the court in *Guerra* states:

If the disability, although arising from a [preexisting nonindustrial condition], was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration.

(*Guerra v. WCAB* (2016) 81 Cal. Comp. Cases 324, 328.) As noted by Dr. Wachs, the applicant was performing his full-time work duties without any self-imposed or prescribed restrictions for his back prior to his cumulative trauma injury. (Court Exhibit X, p. 9.)

The Court finds Dr. Wachs' medical opinion regarding causation, set forth in his August 17, 2023, medical report, to be substantial medical evidence following his review of the entire medical record regarding applicant's current and prior injuries, his review of the trial testimony of the applicant and Ms. Mendoza, and the applicant's deposition testimony. Dr. Wachs applies the proper standard in his analysis of causation; i.e., aggravation, acceleration or lighting up of a pre-existing condition is an industrial injury. Dr. Wachs acknowledges the applicant's prior industrial injury on July 23, 2003. (Court Exhibit X, pp. 9 & 22-42.) However, based upon the applicant's job duties while working for defendant Scripps Health, including constant bending, getting on his knees to

clean carts, and lifting from 25 to 75 pounds, the applicant sustained a cumulative trauma injury through May 23, 2020. (MOH/SOE, 7/18/22, 3:9-10, 5:1-2, 8:4-18, 9:3-5, 12:3-4; Court Exhibit X, p. 8.)

Based on the foregoing, the Petition for Reconsideration should be denied because Dr. Wachs' August 17, 2023, medical report is substantial medical evidence regarding the issue of injury arising out of and in the course of employment to applicant's low back as the result of his employment with Scripps Health.

V. RECOMMENDATION

For the reasons set forth above, the WCJ respectfully recommends that the Petition for Reconsideration be denied.

Date: April 3, 2024

Douglas E. Webster
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE